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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

MICHAEL BENDER, *et al.*,
Petitioners,
v.
THE WILLIAMSPORT AREA SCHOOL DISTRICT, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The facts of this case are straightforward. A small group of high school students wish to meet to discuss religious ideas, pray, and read the Bible at a time when all other students have the opportunity to pursue their various interests. Permission to meet was withdrawn solely because the school board attorney advised the school officials that permitting a student meeting for religious speech would violate the Establishment Clause.

This reply brief is necessary because respondent asks this Court to depart from its precedents. Also, many arguments made by respondent and *amici* supporting re-

spondent are at variance with the record in important respects.

ARGUMENT

I. Respondent asks this Court to depart from its precedents in four major ways.

A. Respondent urges this Court to adopt a fundamental misinterpretation of the First Amendment: That the First Amendment does not provide equal protection for citizens' religious speech but instead requires state discrimination against citizens' religious speech. This "compelled discrimination" argument has repeatedly been urged upon this Court, only to be rejected each time as antithetical to the correct understanding of the First Amendment. *See Widmar* v. *Vincent*, 454 U.S. 263 (1981); *McDaniel* v. *Paty*, 435 U.S. 618 (1978); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *see also*, Pet. Br. at 14 n.13 (remarkable number of important speech cases involve religious speech).

B. Respondent attempts to justify this oft-rejected theory by alleging that high school students are incapable of correctly perceiving equal access as state neutrality. Respondent asks this Court to adopt a view of high school students that is contrary to federal court precedent, established educational practice, congressional findings, and the facts of this case. *See* Pet. Br. at 12-15, 27-36.

This Court and the lower federal courts have recognized that high school students are able to observe other students' controversial expression without misperceiving school endorsement. *See Tinker* v. *Des Moines Independent School District*, 393 U.S. 503 (1969); *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624 (1943); *see also*, Pet. Br. at 12-15; 29-31 (lower court rulings). *Cf., School District of Abington* v. *Schempp*, 374 U.S. 203, 225 (1963) (objective study of Bible in school curriculum does not imply state endorsement of its

religious teachings); *Board of Education* v. *Pico*, 457 U.S. 853 (1982) (plurality opinion) (availability of controversial materials in school library with which school does not agree upheld).[1] The Congress passed the Equal Access Act based on its factual findings that high school students could make such a distinction.

This case is unlike those cases in which the Court has considered student perception as a factor in finding an Establishment Clause violation. In those cases, student perception of state endorsement has been accurate, as when the state has initiated religious inculation as part of the curriculum (*see Schempp, supra*; *Engel* v. *Vitale*, 370 U.S. 421 (1962); *McCollum* v. *Board of Education*, 333 U.S. 203 (1948)), or legislated a moment of silence

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[1] Religious ideas may be, and are, discussed in history, literature, philosophy, science, and other classes that deal with important ideas or values. *See, e.g., Schempp*, 374 U.S. at 225. Such materials have not been discarded because of a remote possibility that some student may misunderstand the state's neutrality in regard to the religious ideas presented. The presumption has been that high school students are able to distinguish the presentation of religious ideas from state endorsement of those ideas. *See, e.g., id.*; *Grove* v. *Mead School District*, 753 F.2d 1528, 1539-41 (9th Cir. 1985) (Canby, J., concurring) (high school students understand that curricular material referring negatively to religion or profanely to Jesus Christ does not convey governmental endorsement of those religious views).

In fact, the National Education Association has stated that "the survival of democracy requires that every state maintain a system of free public education that prepares its citizens to . . . [r]ecognize the cultural, social, political, and religious differences found throughout the world." *The Resolutions of the National Educational Association of the United States 1984*, Section A-2. Psychological evidence indicates that high school students possess the cognitive capacity necessary to form their own ideas, to disagree with the views of peers and authority figures, and to establish the personal ideals and values of self-identity. *See* Note, *The Constitutional Dimensions of Student-initiated Religious Activity in Public High Schools*, 92 Yale L.J. 499 (1983).

for the specific and sole purpose of encouraging religious activity (*Wallace* v. *Jaffree*, No. 83-812 (June 4, 1985)),[2] or spent substantial amounts of money to provide instruction in religious schools (*School District of Grand Rapids* v. *Ball*, No. 83-990 (July 1, 1985)).

High school students are repeatedly exposed to materials and discussions, both curricular and extracurricular, that demonstrate they are not spoon-fed material to learn by rote, but are expected to think critically about their lives and the society around them. "[J]ust as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members." *Pico*, 457 U.S. at 868 (plurality opinion).

Indeed, the Williamsport school officials, the educational experts closest to the students, have judged that high school students should be allowed to form their own groups to pursue a variety of interests. The school officials, therefore, would seem to have concluded that students are able to recognize that the groups formed reflect the students' interests and not necessarily the views of the school. P. App. at 19a; *id.* at 49a (Adams, J., dissenting).

A primary educational mission of a high school is to ensure that students have a *proper* understanding of the Bill of Rights as they begin to participate in our democratic process. To prohibit freedom of speech to these

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[2] In *Jaffree*, solely for religious purposes, the state attempted to initiate a devotional religious activity as part of the school curriculum. In direct contrast, this case involves only student-initiated, student-led extracurricular religious speech, as in *Widmar*. *See* Pet. Br. at 19-20.

students is to substitute censorship for education precisely where education should occur.

C. Respondent asks this Court to focus its "primary effect" inquiry solely on the one group seeking to meet for religious speech rather than on the entire activity period during which twenty-five other student groups meet. This is precisely the approach repudiated in *Widmar*. 454 U.S. at 273. The relevant issue is whether an objective observer would perceive equal access as state endorsement of, or state neutrality toward, these students' religious speech. *Cf.*, *Jaffree*, slip op. 10 (O'Connor, J., concurring in the judgment); *Widmar*, 454 U.S. at 274 n.14.

The Williamsport High School activity period is open to any student activity that contributes "to the intellectual, physical or social development of the students and is otherwise considered legal and constitutionally proper." P. App. A at 9a; J.A. 65, 67, 90, 103. More than twenty-five student organizations currently meet during the activity period, and the potential number of groups is limited only by the number of students who wish to exercise the option of forming a group. P. App. A at 8a; P. App. C at 81a, 91a. The high school has never denied any other student group permission to meet. *Id.*

The courts below repeatedly emphasized both the complete voluntariness of the students' decisions to initiate and participate in any of a broad range of activities and the neutrality of school officials in the students' selection of activities. P. App. A at 8a, 18a-20a; P. App. C at 96a. Before every activity period, each student decides which activity, if any, to attend that particular day and must choose to leave the homeroom if he or she wishes to attend one of the twenty-five activities. P. App. A at 55a (Adams, J., dissenting).

Thus, as in *Widmar*, there is no reasonable inference that the state endorses these students' religious speech.

The activity period is available to a broad class of speakers, a few of whom engage in religious speech. Equally important, the number of groups indicates, and the record confirms, that the decision of each student to attend a particular group, or not to attend any group, is made without interference from school authorities. A weaker case for finding an impermissible message of state "endorsement" of religion is difficult to imagine.

D. Respondent's "compelled discrimination" theory creates the very excessive entanglement prohibited by the decisions of this Court. As in *Widmar*, excessive entanglement would result if school administrators are required to perform the "impossible task" of "determin[ing] which words and activities fall within 'religious worship and religious teaching.'" 454 U.S. at 272 n.11. For example, in some years, Williamsport High School has offered a course entitled "Literature of Western Religions." J.A. 87. If a student group formed during the activity period to discuss topics raised in that class, the school administrator would be hard-pressed to distinguish it from these students' group on a constitutionally principled basis. The same is true for a philosophy or ethics group. *Cf.*, *Tinker*, 393 U.S. at 516 (Black, J., dissenting) (facts indicate religious motivation behind students' speech). *See* amicus curiae brief of Ad Hoc Group of State Education Officials, School Administrators and School Board Members (Br. 2, 7, 9-11) (exclusion of students' religious speech creates irresolvable dilemma).

II. Many arguments of respondent and *amici* supporting respondent are at variance with the record. Only the most important will be discussed here.

A. The discretion of high school officials is not at issue in this case. Thus, the Court need not explore the parameters of high school students' free speech rights in order to decide this case.

As the record makes clear, the students were initially given permission to meet. The sole reason for with-

drawal of permission to meet was the opinion of the school board attorney that the Establishment Clause prohibited students meeting for religious expression on public school property. Pet. App. C at 84a. The decision to exclude them was not made for curricular, educational, or disciplinary reasons. P. App. A at 18-20; P. App. C at 83a-84a; J.A. 68, 84-85. As the school board explained to the students, "neither the School Board nor the Administration regard the proposed prayer fellowship group as being unworthy. Present law simply does not permit public schools to authorize or support religious activities on school property." J.A. 48-49.

B. Contrary to the assertions of *amici* American Civil Liberties Union, et al. (Br. 24 & n.10), and American Jewish Congress, et al. (Br. 15, 28), school policy does *not* require teacher participation in a student group. P. App. A at 9a, 26a-27a; J.A. 83, 143-44.[3] Furthermore, a teacher did *not* participate in the content of these students' meetings. *Id.* In the initial meeting and the meetings during the 1983-84 term, the teacher took attendance and then sat apart from the students to do his own work. *Id.* This has always been undisputed.

Teachers are capable of functioning solely as monitors to perform incidental "housekeeping" tasks, i.e., to take attendance and be available in an emergency. Teachers in public schools must walk a fine line every day in dealing with topics such as comparative religion, history, literature, philosophy, and science, which sometimes touch on religious values and issues. The law assumes a teacher can be neutral in a public school curricular setting. *Schempp*, 374 U.S. at 225 (teaching religion objectively); *Epperson* v. *Arkansas*, 393 U.S. 97

[3] The students have never wanted a teacher to participate in their meeting. If the mere presence of a teacher were troubling, a teacher could sit outside the cafeteria door, close enough to respond to an emergency but otherwise entirely removed from the meeting.

(1968) (teaching science). The same teacher can be neutral in an extracurricular setting when he or she is not participating in the content of a meeting but merely performing "housekeeping" tasks.[4]

Quite to the contrary, excessive entanglement will be created if religious speech must be excluded. *See supra*, p. 6.

C. The suggestion by *amici* American Civil Liberties Union, et al. (Br. 7 & n.5), that this Court remand this case to the district court for reconsideration under the Equal Access Act lacks merit. Regardless of any district court conclusion on remand as to the applicability of the Act in this case, the court of appeals' rationale prohibits the students' religious speech during the activity period, whether their claim is based on the Constitution or an act of Congress. P. App. at 43a n.30.[5]

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[4] This case does not involve the supervision and monitoring problems that are present when public school teachers enter private religious school classrooms or where private school teachers are government subsidized, the salient features of the programs struck down by this Court on "entanglement" grounds. *Aguilar* v. *Felton*, No. 84-237 (July 1, 1985), slip op. 10; *id.* at 2 (Powell, J., concurring); *Lemon* v. *Kurtzman*, 403 U.S. 602, 619 (1971). In the words of this Court, "[i]t can hardly be said that the supervision of public employees performing public functions on public property creates an excessive entanglement between church and state." *Wolman* v. *Walter*, 433 U.S. 229, 248 (1977).

[5] The lower federal courts are continuing to wrestle with the issue of equal access for students' religious speech. *See Amidei* v. *Spring Branch Independent School District*, No. H-84-4673 (S.D. Tex., April 26, 1985) (Equal Access Act requires high school to allow student group to meet for religious speech when other students allowed to meet); *Mergens* v. *Board of Education of Westside Community Schools*, No. CV 85-0-426 (D. Neb., May 23, 1985) (denial of preliminary injunction to high school students seeking equal access under the Act); *Bell* v. *Little Axe Independent School District No. 70*, 766 F.2d 1391 (10th Cir. 1985) (holding religious group meetings at elementary level unconstitutional, noting the inapplicability of the Equal Access Act below secondary level); *Commack School Dist.* v. *Rossi, et al.*, No. CIV-85-1288 (E.D.N.Y. 1985) (school district suing for declaratory judgment).

D. The insinuation of respondent that the students sought permission to meet out of a desire to have state endorsement is unsupported by the record. As in *Widmar*, the school requires that students request permission to meet, which is an understandable, content-neutral manner restriction. J.A. 71. Furthermore, as the record makes clear, the purpose of Petros is mutual support. They do not seek to impose their views on others. *See, e.g.*, J.A. 16, 18; Pet. Br. at 13 n.8.[6] The students do not want state endorsement; they just want to meet.

E. Respondent asserts that religious speech would dominate the forum at Williamsport High School, which is not true. This Court can reserve the question of forum domination in the event it should arise elsewhere, just as it reserved the question in *Widmar*. 454 U.S. at 275. This Court should not decide that these students' speech is unconstitutional *per se* because of hypothetical problems not presented here.

Most high school students do not choose to spend their valuable free time reading the Bible and praying. Over 98 percent of the students at Williamsport High School have chosen not to attend these students' meetings, either in their initial meeting or during the 1983-84 school year. Instead, a small minority of students have become the only group denied permission to meet during the activity period, solely because their speech is religious. If these students are prohibited from meeting, the message that the state sends is clear: it is a message of censorship, not neutrality. Students whose personal conduct is otherwise exemplary will be disciplined solely for expressing their religious values and ideas at a time when other students are allowed to express themselves.

The vast majority of school administrators are like the school principal here: They want to do what is legal

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[6] If the students sought to meet to impose their views on others, they would not have agreed to forego use of the school media.

but they are not always sure what that is. The First Amendment does not permit the state to require or favor religious speech by high school students, but neither does it require the state to censor high school students' religious speech. It is a critical distinction upon which these students' liberty depends.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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